

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1616

HAROLD O. NELSON, PETITIONER

v.

DEFENSE LOGISTICS AGENCY, RESPONDENT  
(Formerly Defense Supply Agency)

Petition for Rehearing on a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

DISCRIMINATION BECAUSE OF AGE IN THE  
FEDERAL GOVERNMENT

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Supreme Court, U. S.  
FILED

OCT 24 1978

MICHAEL R. RYAN, JR., CLERK

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Petition for Rehearing on a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.-----Discrimination Because of Age in the Federal Government.

This Court denied the petition for a Writ of Certiorari in the above-entitled case on 2 October 1978.

GROUND'S FOR REHEARING

1. Previous Agreement: From page 10A of The Dallas Morning News, Tuesday, June 28, 1977: "Supreme Court Rules Lawyers Can Advertise, WASHINGTON (UPI) -- \* \* \* \* \* In still other actions, the court:

Agreed to decide next term whether a person who brings a complaint under the 1967 Age Discrimination in Employment Act may demand a jury trial. \* \* \* \* \*

COMMENT: It would appear that the above entitled case would fall within this agreement, even though it occurred in an Agency of the Federal Government.

2. Fifth Circuit Court Work Overload: From page 21A of The Dallas Morning News, Thursday, July 6, 1978, "Congress fights over splitting or enlarging 5th Circuit, By Carolyn Raeke, Washington Bureau of the News, WASHINGTON--\* \* \* \* \* Both sides agree there is too much work for the 15 judges on the 5th Circuit to handle. A Senate Committee report explaining the legislation notes that in 1961 there were seven judges and 630 appeals filed, or 90 cases per judge, but that in 1976, with

15 judges, there were 3,629 cases filed--or 242 per judge. \* \* \* \* \* AS HOUSE Judiciary Committee Chairman Peter Rodino, D-N.J., pointed out in hearings last September, appeals filed in the 5th Circuit constitute "the largest number of any of our federal circuits." \* \* \* \* \* "From page 10A of the Dallas Morning News, Thursday, July 29, 1978, "5th Circuit issue discussed, Washington Bureau of the News, WASHINGTON -- House and Senate conferees failed again Wednesday to agree on what to do with an enlarged 5th Circuit Court of Appeals. \* \* \* \* \* Lack of resolution of the 5th Circuit issue is holding up a bill creating over 100 new judgeships, including 10 in Texas, with three of them in the Northern District (Dallas-Fort Worth). \* \* \* \* \* " COMMENT: To be noted in connection with the above entitled case which was disposed of by "Affirmation without Opinion."

3. Youthful Judge: From The Dallas Morning News, Thursday, September 14, 1978, "U.S. judge in Dallas testifies on antitrust; U.S. Dist. Judge Patrick Higginbotham of Dallas was one of the three federal jurists who testified in Washington this week before a special panel studying revision of antitrust laws. \* \* \* \* \* The youngest federal judge in the nation when he was appointed in 1975, Higginbotham, 39, was active in complex antitrust litigation \* \* \* \* \*."

COMMENT: Judge's age to be noted, and without a jury trial as demanded, it is hard to believe that a fair assessment of the facts would ensue in an Age Discrimination case, especially a case involving an Agency of the Federal Government.

4. Declaration Against Interests: From Defense Logistics Agency News, Alexandria, Va. 22314, December 5, 1977, Vol. 15, No. 18. "Average age: 44 \* \* \* \* \* Average age by activity: DLA-wide: 43.6 \* \* \* \* \* Average length of service: 16.6 \* \* \* \* \* In the past, the classic solution to an "aging work force" was to hire young, bright "fast burners" for intern programs

providing automatic promotion to jobs vacated by those retiring. This hasn't proved fair to mid-level workers who have been by-passed and poses a problem in establishing a balanced work force.

\*\*\*\*\*

COMMENT: Since the average age DLA-wide is 43.6, there is no question that the average age of supervisory and management personnel is considerably below this figure. This classic solution to an "aging work force" is an admission or declaration against interests that age discrimination did, in fact, exist. This classic solution also included the promotion of younger employees other than trainees, and extended to at least the end of 1975, as set forth in the Petitioner's pleadings.

5. The "McElrath v. United States, 102 U.S. 426" case cited in the Solicitor General's Opposition was decided in 1880. The Court of Appeals, New Jersey recently decided that parties were entitled to jury trial of retired employee's allegations that he had been illegally discriminated against because of his age with respect to inter alia, promotions and salary increases. See, e.g., Roger v. Exxon Research & Engineering Co., 1977, 550 F.2d 384. This case should be applicable when an agency of the Federal Government is a party to the suit.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Rehearing of this petition for a Writ of Certiorari should be granted.

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CERTIFICATE

This is to certify that this petition for a Rehearing on a Writ of Certiorari is presented in good faith, not for delay of any kind, and is restricted to the grounds above specified.

*Harold O. Nelson*  
Harold O. Nelson, Pro Se

CERTIFICATE OF SERVICE

I certify that this Petition for Rehearing was served on opposing counsel by depositing same in the United States Regular mail, postage prepaid, three copies each to the the following on 21 October 1978 :

Mr. Kenneth Mighell, U.S. Atty.  
ATTN: Mr. Charles Cabaniss, Asst.  
U.S. Atty. Room 16G28  
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Dallas, Texas 75202

Mr. Wade H. McCree, Jr.  
Solicitor General  
Department of Justice for U.S.  
Tenth and Constitution Ave.  
Washington, D.C. 20530

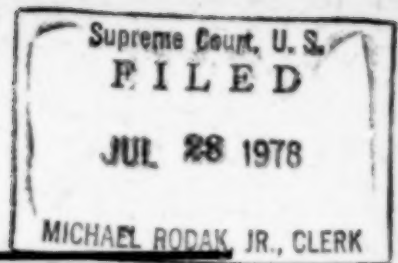
Lt. General W. W. Vaughan, Agency  
Director  
ATTN: DSAH-L, Defense Logistics  
Agency, Headquarters  
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HAROLD O. NELSON, PETITIONER

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DEFENSE LOGISTICS AGENCY

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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Petitioner contends that the court of appeals erred in its summary affirmance of the district court's rejection of his claim that he was denied promotion because of his age.

The district court conducted a trial and found that age was not a factor in petitioner's failure to obtain promotion as a government employee (Pet. App. B). The court of appeals affirmed without opinion (Pet. App. A). Petitioner presents 21 questions for review by this Court, but most of them appear to have nothing to do with the issues resolved by the district court. For example, because the district court found no discrimination, it did not consider the time for filing claims (Pet. App. B-4). Some of the other questions—such as whether there is a

constitutional right to a jury trial in a suit against the government—have long since been resolved adversely to petitioner. See, e.g., *McElrath v. United States*, 102 U.S. 426. Moreover, the restitutionary remedies sought here are of an equitable nature. The remainder of the questions simply challenge the district court's factual findings. As to these questions, no extraordinary circumstances call for review of the factual findings of the two lower courts. See, e.g., *Berenyi v. Immigration Director*, 385 U.S. 630.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,  
*Solicitor General,*